IN THE

Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Petitioner,

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS OF RESPONDENTS TO MOTIONS FOR LEAVE TO FILE BRIEFS AS *AMICUS CURIAE*

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INDEX

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Statement

Respondents object to the motions for leave to file briefs as *amicus curiae* made by the following organizations:

American Spice Trade Association
California Manufacturers Association
Chamber of Commerce of Cleveland, Ohio
Chamber of Commerce of the United States

Georgia State Chamber of Commerce
Illinois State Chamber of Commerce
Institute of Shortening and Edible Oils, Inc.
National Association of Margarine Manufacturers
National Paint, Varnish and Lacquer Association, Inc.
Ohio Chamber of Commerce

Inasmuch as the grounds advanced in support of the several motions are generally similar, respondents for convenience ask leave to file their objections to all of the motions under a single cover.

It is noted that respondents have consented to the filing of a brief as *amicus curiae* by the Pensylvania State Chamber of Commerce, which states that it plays "an important role in influencing the business climate" of Pennsylvania. Because this is the state to which petitioner removed its plant, the Pennsylvania State Chamber of Commerce may be thought to have a particular interest in this case not shared by the moving organizations.

Reasons for Objections

Respondents have withheld consent to the filing of briefs as *amicus curiae* by the moving parties, for the following reasons:

I

The moving parties do not have an interest in this case of a sufficiently particular nature to justify their intervention. Were these organizations, which are composed of businessmen and employers, permitted to file briefs, literally thousands of similar associations who claim the same broad and indefinite interest might with equal standing assert the same privilege.

Respondents do not believe that a better understanding of the legal questions in this case will necessarily be promoted by the filing of a substantial number of briefs. Respondents do believe that such arguments as are within the interests of associations of this class will be found presented by the Pennsylvania State Chamber of Commerce in its brief as *amicus curiae.*

II

All of the facts and questions of law presented by the moving parties have been advanced and argued by petitioner in the courts below and in this Court. No reason is offered to support a valid belief that any of those matters have not been, or will not be presented adequately by petitioner.

Respondents have set forth their position as to those matters in their brief in opposition to the petition for certiorari, and further discussion thereof at this point is therefore believed to be unnecessary.

III

The moving parties in seeking to establish the importance of this case have stated, among other things, that the Court of Appeals decision will spawn confusion, disrupt labor relations, threaten an employer's right to manage his affairs and retard industrial development.

It is difficult to accept the view that any of these serious consequences will flow from the Court of Appeals decision. This case was decided upon its own facts and upon a construction of the seniority provisions of the collective agreement here involved. There are "great variations" in seniority provisions of collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727*

v. *Campbell,* 337 U. S. 521, 526 (1949). A construction of one type of provision is not dispositive of all others. The moving parties are themselves in disagreement as to the nature of seniority provisions in use. Such provisions are, for example, described by them as "standard",[1] "vary[ing] widely",[2] "similar",[3] "not unique" and subject to "no common industry practice".[4]

In the circumstances, respondents cannot perceive that the disastrous consequences envisaged by the moving organizations will come to pass.

The Court of Appeals decision in this case will not prevent any employer from relocating his plant nor will it bar him from selecting any site for a new plant that he desires. It will not interfere with his relations with employees at a new plant, if in fact he already has any such employees there—or with the right of his employees to select their bargaining representative.

The Court of Appeals decision in this case will only require an employer in similar circumstances, to recognize his employees' seniority rights under a collective bargaining agreement earned by years of service in his employ. It will only require him in such situation to offer to re-employ them at the relocated plant before he hires new employees there who have no seniority.

Viewed realistically, the decision in this case construing the provisions of this contract scarcely presents the picture of drastic confusion painted by the moving parties. The true picture is one of adherence to a contractual obligation.

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[1] Ohio Chamber of Commerce, page 2.

[2] Chamber of Commerce of the United States, page 5.

[3] Chamber of Commerce of Cleveland, Ohio, page 1.

[4] National Association of Margarine Manufacturers, page 3. "Each collective bargaining agreement is tailored to a particular case, and they differ widely." *Ibid.*

CONCLUSION

The motions for leave to file briefs as *amicus curiae* should be denied.

August 15, 1961.

Respectfully submitted,

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INDEX

Table of Citations

Cases:

Statutes:

Others:

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Petitioner and respondents have consented in writing to the filing of this brief pursuant to Rule 42.

Interest of Amici Curiae

The judgment of the Court of Appeals for the Second Circuit was rendered by a panel which included Judge J. Warren Madden of the United States Court of Claims,

sitting by designation as authorized by 28 U.S.C. § 293(a). The questions presented by the Petition for A Writ of Certiorari include the following: "(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?" In connection with the question thus presented petitioner contends that: the Court of Claims, as held in *Williams* v. *United States,* 289 U.S. 553, is a legislative and not a constitutional court; a 1953 statute, 67 Stat. 226, 28 U.S.C. § 171, declaring the Court of Claims "to be a court established under article III of the Constitution of the United States," is unconstitutional; the assignment statute is unconstitutional insofar as it authorizes the Chief Justice to designate judges of the Court of Claims for temporary service on constitutional courts such as the Court of Appeals for the Second Circuit; and therefore Judge Madden's participation in the judgment below is prohibited by the Constitution and vitiates the judgment.

The important constitutional issues thus presented by the Petition directly affect the Judges of the Court of Claims. Their right to serve on other constitutional courts, pursuant to designation by the Chief Justice under the assignment statute, is questioned, and doubt is cast upon their right to enjoy the benefits and protections conferred by Article III of the Constitution upon judges of constitutional courts. The Judges of the Court of Claims believe that prompt determination of these issues by the Supreme Court will contribute to the preservation of the integrity of the judicial system, and therefore have taken this opportunity to present certain additional reasons for the grant of a writ of certiorari insofar as question (d) of the Petition is concerned. The other questions raised in the Petition do not concern the Judges of the Court of Claims and no views are expressed herein with respect to whether the writ should also extend to such questions.

It is noted that 28 U.S.C. § 2403 may be applicable since question (d) draws into question the constitutionality of an Act of Congress affecting the public interest, and that no court has certified such fact to the Attorney General.

Reasons for Granting the Writ with Respect to Question (d) Presented by the Petition

The constitutional issues raised by petitioner are important to the administration of justice in the narrowest sense of that term. The machinery for administering justice is itself the subject of petitioner's attack. Under the assignment statutes, judges of the Court of Claims may be assigned for temporary service on the district courts and courts of appeals, and judges of those courts (and retired justices of this Court) may be assigned for temporary service on the Court of Claims. Such assignments have been made on a number of occasions in the past, including the assignment of Judge Madden which is directly in question, and the better administration of justice may require such assignments in the future if permissible under the Constitution. The propriety of such assignments, both past and future, and the validity of judgments participated in by assigned judges, will be clouded until such time as the constitutional issues raised by petitioner are settled by this Court.

The distinction between legislative and constitutional courts has been confused and has resulted in a number of vexatious problems ever since the legislative-court doctrine was extended from the territorial courts to include the Court of Customs and Patent Appeals, by *Ex Parte Bakelite Corporation,* 279 U.S. 438, and the Court of Claims, by *Williams* v. *United States,* 289 U.S. 553. See, *e.g.,* the various opinions in *National Ins. Co.* v. *Tidewater Co.,* 337 U.S. 582. The correctness of those decisions has been ques-

tioned by the Solicitor General in *Pope* v. *United States,* 323 U.S. 1, and in *Lurk* v. *United States,* 366 U.S. 712, although this Court did not deem it necessary to decide the issue under the circumstances of those cases. The Congress has attempted to clear up this confusion and resolve any problems concerning the operation of the assignment statutes and otherwise by expressly declaring that the Court of Claims and the Court of Customs and Patent Appeals, as well as the Customs Court, are constitutional courts created under Article III of the Constitution. 28 U.S.C. §§ 171, 211, 251. The power of the Congress to do this has been questioned by petitioner and involves an important constitutional issue which we believe should be decided by this Court.

We think it appropriate for these constitutional issues to be decided in this case, and therefore urge that the Petition be granted insofar as question (d) presented therein is concerned. The constitutional provisions involved are not broad grants of power affecting the general operation of the Government, as to which the accumulation of additional experience and avoidance of decision until necessary may be desirable. Rather, they are technical provisions relating to the establishment and operation of the judicial system itself and present problems which are peculiarly within the competence of this Court to resolve. We see no advantage that can be derived from further delay in deciding whether judges of the Court of Claims can be assigned to serve on other constitutional courts such as the Court of Appeals for the Second Circuit. The continued existence of doubts about this practice can only impair the confidence of the public in our judicial system, and render suspect the validity of decisions made or participated in by assigned judges. If the existing practice is wrong, certainly it should be stopped as soon as pos-

sible. If it is entirely proper, as we believe, much needless controversy and uncertainty will be avoided by so deciding in this case.

Petitioner apparently did not bring to the attention of the Court of Appeals the objection now made to Judge Madden's participation in the hearing and decision of that court. But as Mr. Justice Frankfurter noted in his dissent on other grounds in the *Lurk* case, *supra* at p. 713, the question raised by petitioner is jurisdictional in nature. Such a jurisdictional point may be raised at any time. See *e.g., McGrath* v. *Kristensen,* 340 U.S. 162, 167. If Judge Madden, because of constitutional prohibitions, was not competent to serve, as petitioner contends, the judgment in which he participated is null and void. *United States* v. *American-Foreign SS. Corp.,* 363 U.S. 685; *Ayrshire Corp.* v. *United States,* 331 U.S. 132; *Frad* v. *Kelly,* 302 U.S. 312. Thus, in the *Ayrshire Corp.* case this Court held that a judgment rendered without the participation of all three members of a three-judge court, contrary to a statutory prohibition, was void and should be vacated even though the issue had not been raised before the three-judge court.

In *Amer. Const. Co.* v. *Jacksonville Railway,* 148 U.S. 372, there was a contention that one of the judges who participated in the hearing and decision of the case by the Circuit Court of Appeals was prohibited from such participation by a statutory provision. This Court stated that: "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari.*" *Id.,* at p. 387. The fact that a constitutional rather than a statutory prohibition is claimed to be applicable here cannot be a material distinction. Thus,